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In The

Supreme Court of the United States

PABST BREWING COMPANY,

Petitioner,

v.

ROSETTO et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should former employees be allowed to proceed to trial and to introduce non-objective extrinsic evidence in seeking to require an employer to provide lifetime health care benefits in the absence of any such affirmative commitment by the employer and in the absence of any ambiguity in the collective bargaining agreement?

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The decision of the Eastern District of Wisconsin is reported at 71 F. Supp.2d 913 (1999) (App. 17). The decision of the Seventh Circuit Court of Appeals is reported at 217 F.3d 539 (2000) (App. 1).

JURISDICTION

The Seventh Circuit Court of Appeals entered its order denying rehearing *en banc* on July 31, 2000 (App. 48). On October 11, 2000, the Court extended the Petitioner's time for filing this petition to and including December 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

§ 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

§ 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (as amended) (ERISA), 29 U.S.C. § 1132(a)(1)(B), provides in relevant part:

> A civil action may be brought by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

STATEMENT OF THE CASE

Until 1996, the Petitoner, Pabst Brewing Company (Pabst)[1], operated a brewery in Milwaukee, Wisconsin. The Respondent Union, Machinists District 10 (Union), represented members of the Union employed by the Petitioner, including the Respondent Individuals, who are former employees of the Petitioner and are representative class members in the action below. In 1995, the Petitioner and the Respondent Union were unable to reach a new collective bargaining agreement and the parties agreed to an extension. After this extension expired, Pabst ceased providing retiree health care benefits effective August 1, 1996.

On September 19, 1996, the Respondents commenced the action below seeking reinstatement of retiree health care benefits. Pabst agreed to voluntarily reinstate benefits to provide time to negotiate a resolution but, when these efforts failed, health care benefits were again terminated effective January 31, 1997, approximately one month after the Milwaukee brewery closed its doors. The

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[1] The parent company of petitioner is S & P Company. There are no non-wholly owned subsidiaries of Pabst Brewing Company.

Respondents then filed an amended complaint alleging (1) breach of contract under § 301 of the LMRA, (2) violation of the employee benefit plan under § 502(a)(1)(B) of ERISA, and (3) demanding arbitration under § 301 of the LMRA. On February 13, 1997, the Petitioner filed a counterclaim for declaratory judgment.

On March 6, 1997, following a two-day evidentiary hearing, the district court certified the class of Respondent individuals and issued a preliminary injunction requiring the Petitioner to reinstate retiree benefits and ordering arbitration. The Petitioner then appealed the case to the United States Court of Appeals for the Seventh Circuit.

On October 17, 1997, the Seventh Circuit reversed the district court's order, holding that the Respondent Union had no standing to bring the retirees' grievance to arbitration. *Rossetto v. Pabst Brewing Company*, 128 F.3d 538, 541 (7th Cir. 1997)[2]. The order compelling arbitration and reinstating health benefits was vacated. The Respondents' request for a rehearing and suggestion for rehearing *en banc* was denied, as was their petition for writ of *certiorari*. *Rossetto v. Pabst Brewing Company*, 524 U.S. 927 (1998).[3]

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[2] The underlying court documents are inconsistent in the spelling of the named Respondent, Rossetto. When citing to any case below, Petitioner adopts the spelling that appears in the official report of that case.

[3] The decisions and orders in the earlier phase of this case are not included in Petitioner's Appendix because the present Petition does not deal with those issues pertaining to the Union's standing to seek arbitration. If, however, the Court

Following remand as to the Respondents' LMRA and ERISA claims, and following discovery, the Petitioner moved for summary judgment on March 1, 1999. The grounds for the Petitioner's motion were that the collective bargaining agreement was unambiguous on its face and, even if one were to consider evidence offered by the Respondents, it would fail to establish that the contract, while it may appear to be clear, is actually ambiguous.

In a decision dated November 1, 1999, the district court found the collective bargaining agreement was not ambiguous and granted judgment in favor of the Petitioner. *Rossetto v. Pabst Brewing Company*, 71 F. Supp.2d 913 (E.D. Wis. 1999) (App. 17). The Respondents appealed to the United States Court of Appeals for the Seventh Circuit.

On June 29, 2000, the Seventh Circuit reversed the district court's award of summary judgment to the Petitioner (App. 1). The Seventh Circuit acknowledged that the collective bargaining agreement between the Petitioner and the Respondent Union was silent as to the duration of retiree health care benefits and, therefore, no ambiguity appeared on the face of the agreement. Nevertheless, it found that the extrinsic evidence provided by the Respondents revealed a "latent" ambiguity in the agreement. Such evidence consisted of language from another collective bargaining agreement between the Petitioner and a different union, the fact that a different brewer (Schlitz Brewing Company) continued to pay

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should desire to have those materials as well, the appropriate supplementary submission will be prepared at the Court's direction.

retirees when it closed its plant in 1982, and the fact that retirees' wives were generally younger than retirees and that women tend to live longer then men (App. 11-12).

The Petitioner's petition for rehearing, with suggestion for rehearing *en banc* was denied on July 31, 2000. On October 10, 2000 the Petitioner moved for and obtained from the Court, on October 11, an extension of time in which to file this petition for a writ of *certiorari* to and including December 28, 2000.

REASONS FOR GRANTING THE PETITION

Roughly one-third of America's twenty-three million retirees receive health care benefits from their former employers. General Accounting Office Report, GAO/HEHS 97-150, July 11, 1997. The vast majority of such benefits are provided under colletive bargaining agreements. At the expiration of a collective bargaining agreement, however, a question often arises whether retiree health care benefits survive the agreement. Some agreements unambiguously answer the question. Others address it, but patent ambiguities remain. Still others are silent about it. This case concerns the legal standard to be applied when the agreement is silent. It is an issue of exceptional national importance and application meriting the Court's time and attention.

In the decision below, the Seventh Circuit has further muddied already unclear waters. In *Senn v. United Dominion*, 951 F.2d 806 (7th Cir. 1992), *reh'g denied*, 962 F.2d 655 (7th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993), the court

adopted a clear presumption that retiree health care benefits did not vest under silent contract language. But, just one year later, the Seventh Circuit appeared to cast aside the *Senn* presumption where ambiguity was present. *See Bidlack v. Wheelabrator*, 993 F.2d 603 (7th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 909 (1993). The deeply divided *Bidlack* decision created greater uncertainty due to its willingness to accept extrinsic evidence when the collective bargaining agreement contains a clear ambiguity. In the case below, however, the Seventh Circuit – finding no ambiguity in the collective bargaining agreement – determined that a latent ambiguity still existed based in part on the actions of a different brewer in a different decade.

This latest Seventh Circuit decision only exacerbates a wide divergence of law already festering within the circuits about how to interpret contractual silence on the duration of retiree health care benefits in actions brought under § 301 of the LMRA and § 502(a)(1)(B) of ERISA. As Chief Judge Posner correctly observed in the decision below, the decisions of Circuit Courts of Appeals are "all over the lot" (App. 6). Some circuits hold that silence provides a presumption that retiree health benefits do not vest, while others hold exactly the opposite. And positions in between these polar opposites exist, such as the Seventh Circuit view described above, or the view that a relevant distinction exists where some retirees base their claims on a collective bargaining agreement while other retirees base their claims on an employee benefit plan document. The need for judicial guidance from this Court is acute.

The harm from the decision below would not be limited to the Seventh Circuit. As uncertainty has dominated the Circuit Courts of Appeals on the question here presented, both courts and litigants frequently use developments in other circuits as guideposts in the fog. The decision below must not be allowed to control cases in the Seventh Circuit or affect litigation in other circuits because its reasoning is fundamentally erroneous. In the course of applying a presumption with an exception for ambiguity, the Seventh Circuit invented a new doctrine of "latent ambiguity" that would arguably create such ambiguity in every agreement ever signed. If unreversed, the decision below would likely require a jury trial in many retiree health care benefits cases disputed in the Seventh Circuit and in other circuits, as litigants across the country would seek to avoid summary judgment by alleging the existence of "latent ambiguities" under the *Rosetto* theory.

The approaches to the question presented taken by the various circuits vary widely, and this Court may well consider the relative merits of each approach in reaching a decision in this case. One approach that should be categorically rejected, however, is the one adopted by the Seventh Circuit in this case. The court below misunderstood its mission; it tried to provide a default rule to guide the negotiators of future agreements. And it failed in this mission by so broadly defining "latent ambiguity" that the resulting default rule would simply send the vast majority of cases to the jury. The court failed to understand that today's retiree health care benefits cases involve judicial interpretation of yesterday's agreements.

What the courts and litigants need most from this Court are clear rules for interpreting those old agreements.

I. THE COURT SHOULD GRANT THE PETITION BECAUSE THE CIRCUITS ARE SEVERELY DIVIDED ON THE INTERPRETATION OF COLLECTIVE BARGAINING AGREEMENTS THAT ARE SILENT AS TO THE DURATION OF RETIREE HEALTH CARE BENEFITS.

A. The Seventh Circuit Is Confused and Internally Divided.

Employers, unions, and retirees in the Seventh Circuit have faced changing standards of interpretation for collective bargaining agreements that are silent as to the duration of retiree health care benefits. In *Senn, supra,* 951 F.2d at 816 (7th Cir. 1992), the court held:

> The default rule in this Circuit is that 'entitlements established by collective bargaining agreements do not survive their expiration or modification.'[citation omitted.] Thus, it requires more than a statement in a collective bargaining agreement that welfare benefits 'will continue' to create an ambiguity about vesting, for the logical interpretation under our rule is that benefits 'will continue' for the duration of the contract.

A year later, however, the Seventh Circuit issued *Bidlack, supra,* 993 F.2d 603 (7th Cir. 1993) *(en banc)*. *Bidlack* was a widely split decision in which three judges joined in the majority opinion authored by then Circuit Judge Posner, three joined in a concurring opinion authored by Judge Cudahy, and four joined in a dissenting opinion

authored by Judge Easterbrook. The majority opinion, while not expressly overruling *Senn*, held that an ambiguous collective bargaining agreement will not entitle the employer to rely on the *Senn* presumption that the commitment expires with the agreement. *Id.* at 608-10. Judge Cudahy's concurring opinion identified six possible approaches to interpreting collective bargaining agreements in addressing the vesting of retiree health care. These include, *id.* at 611:

- A *"strong" no-vest rule*, which "provides that retiree health benefits in collective bargaining agreements do not vest unless the language in the agreement explicitly provides for vesting."
- A *"weak" no-vest rule*, which "holds that if the collective bargaining agreement is ambiguous with respect to vesting, resort to extrinsic evidence is proper. However, if a preponderance of the evidence does not show that the parties intended the benefits to vest, the presumption is that they did not."
- A *"parol substitution" rule* that leans *away* from vesting, which allows use of "extrinsic evidence to determine the intent of the parties as to vesting even when there is no ambiguity in the collective bargaining agreement, as when the agreement is silent. Presumably, in the absence of extrinsic proof of vesting, the court would infer that the parties did not intend to have the benefits vest."
- A *"parol substitution" rule* that leans *toward* vesting, which, "like its counterpart, would resort to extrinsic evidence even when the collective bargaining agreement is silent (or

otherwise unambiguous) about the vesting of benefits, but in the absence of proof that the parties did not intend the benefits to vest, it would presume the benefits vested."

- A *"weak" vest rule*, which "presumes that benefits vest unless there is evidence of an agreement to the contrary. If the collective bargaining agreement is ambiguous, then consideration of extrinsic evidence is permitted to determine whether the parties did not intend the benefits to vest."

- A *"strong" vest rule*, which "presumes that the parties intended the benefits to vest unless they explicitly stated otherwise. If there is an ambiguity, the presumption takes effect and there can be no recourse to extrinsic evidence."

Despite the majority's assurances that the *"strong" no-vest rule* in *Senn* remained the law, Judge Cudahy stated his belief that the *Bidlack* majority had effectively rejected *Senn* in favor of the *"weak" no-vest rule* and that *Senn* was now a "dead letter." *Id.* at 610. The concurring opinion further argued that courts should reject both versions of the *parol substitution rules* (either for or against vesting) as they "denigrate the function of a written contract, in derogation of the traditional parol evidence rule." The concurring opinion pointed out, however, that "[c]hoosing among the four remaining default rules, . . . is more difficult." *Id.* at 611.

The Seventh Circuit certainly has had difficulty in choosing its default rule. While stating a preference for the *"weak" no-vest rule*, the *Bidlack* majority stated that it

would permit the introduction of extrinsic evidence only if such ambiguity was clear:

> Although extrinsic evidence is admissible to show that a written contract which looks clear is actually ambiguous, perhaps because the parties were using words in a special sense, *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 620-21 (7th Cir. 1989), *there must be either contractual language on which to hang the label of ambiguous or some yawning void*, as in the *Duff-Gordon* case [*Wood v. Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917)], that cries out for an implied term. Extrinsic evidence should not be used to add terms to a contract that is plausibly complete without them. *Calder v. Camp Grove State Bank*, 892 F.2d 629, 632 (7th Cir. 1990).

993 F.2d at 608 (emphasis added). Thus while Judge Posner's majority opinion in *Bidlack* softened the Seventh Circuit's stance from a *"strong" no-vest rule* to a *"weak" no-vest rule*, it still required clear ambiguity in the agreement before extrinsic evidence would be permitted.

In the action below, however, no "yawning void" is found in the collective bargaining agreement. Instead, reversing the district court, which relied heavily on *Bidlack*, the Seventh Circuit found a "latent ambiguity" in a contract that provides no support for the parties' intent to vest retiree health care benefits. One cannot tell from the present decision what default rule the court may have relied on, if any, but it appears that the *"weak" no-vest rule* may have been further weakened into one of the *parol substitution rules*.

So, what is the default rule in the Seventh Circuit after *Rosetto*? *Bidlack* provided an exception to the *Senn*

presumption, but only where there was a clear ambiguity or other "yawning void." Leaving patent ambiguities aside, the breadth of *Bidlack* depends on how "latent ambiguity" is defined. But, in *Rosetto*, the court broadly applied latent ambiguity to permit nearly any reference to the "real world" (App. 14). Thus, *Rosetto* makes *Bidlack* the exception that swallows the *Senn* rule. The resulting default rule appears to be this: there is no default rule for contracts that exist in the real world.

These varied approaches toward the interpretation of retiree health care provisions, from *Senn* to *Bidlack* to *Rosetto*, have arisen out of a single circuit over the past eight years. Interestingly, the Seventh Circuit denied the Petitioner's request for a rehearing with the suggestion of a rehearing *en banc* in the present action, perhaps because the individual judges could not imagine being able to reach a consensus on how to approach these cases. *Bidlack* was the widely split result of the last *en banc* rehearing in this setting and it appears to have provided little guidance.

B. Decisions in the Other Circuits Are Similarly Confusing and Inconsistent.

A review of the law of the other circuits reveals a similar jumble of theories, default rules and distinctions without difference. In *International Union, (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1982), *cert. denied*, 465 U.S. 1007 (1984), the Sixth Circuit adopted a *"strong vest" rule*, holding that a collective bargaining agreement that was silent as to the duration of retiree health care should be presumed to vest retiree health care. *Id.*, at 1482. Yet, in

1998, the Sixth Circuit reached a conclusion directly opposite to *Yard-Man* in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998), *cert. denied*, 524 U.S. 923 (1998). In *Sprague*, the court held:

> Because vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest 'must be found in the plan documents and must be stated in clear and express language.' *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993); *see also In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, 902 (3d Cir. 1995) (same); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855 (4th Cir. 1994) (same), *cert. denied*, 514 U.S. 1057 (1995). It is the plaintiffs' burden to prove GM's intent to vest. *Id.*

133 F.3d at 400. Incredibly, the opinion in *Sprague* did not even mention the earlier *Yard-Man* decision. It was not until *UAW v. BVR Liquidating, Inc.*, 190 F.3d 768 (6th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 1674 (2000), that the Sixth Circuit attempted to explain why retiree health care benefits in one setting should be presumed to vest while in another setting, the vesting of such benefits should "not be inferred lightly." The Sixth Circuit's reasoning: in *Sprague* the employer had unilaterally implemented the benefits while in *BVR Liquidating* the benefits had been provided by an employer pursuant to a collective bargaining agreement. In the former setting, reasoned the Sixth Circuit, the employer had to be found to have clearly intended to vest benefits while in the latter, the intent of both parties to the collective bargaining agreement must be discerned. *Id.* at 773. But why this distinction? Is it not just as easy to argue that when a union is

involved in negotiating contract language it is more likely that the contract would *expressly* provide for lifetime benefits if the parties had intended them? Indeed in his majority opinion in *Bidlack, supra,* Judge Posner confirmed this thought in rejecting *Yard-Man*:

> The counterargument is that, knowing this, current employees who may retire in the next three years want their collective bargaining agreement to vest health benefits. *United Auto Workers v. Yard-Man, Inc., supra,* 716 F.2d at 1482. Most, perhaps all, the class members were active employees when a collective bargaining agreement containing the provision for retirees' health benefits was signed.

188 F.3d at 609. The Third Circuit expressed a similar sentiment: "[t]hose who fear that their unions will not bargain for continued benefits for retirees need only see to it that specific vesting language protecting those benefits is incorporated into collective bargaining agreements." *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Skinner Engine Co.,* 188 F.3d 130, 141 (3d Cir. 1999).

The distinction between collectively-bargained and non-collectively-bargained benefits is not limited to the Sixth Circuit; it is also found in the Fourth and Eleventh Circuits. *See Gable, supra,* 35 F.3d at 855 (refusing to find vesting of non-collectively-bargained health benefits); *Keffer v. H.K. Porter Co.,* 872 F.2d 60, 64 (4th Cir. 1989) (citing *Yard-Man* to support vested collectively-bargained benefits); *United Steelworkers of Am. v. Connors Steel Co.,* 855 F.2d 1499, 1505 (11th Cir. 1988) ("We fully concur with

the decisions of the Court of Appeals for the Sixth Circuit in *Yard-Man*"); *Alday v. Container Corp. of Am.*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) ("any retiree's right to lifetime benefits at a particular cost can only be found if it is established by contract under the terms of the ERISA-governed benefit plan document").

A number of other circuits have rejected the Fourth, Sixth and Eleventh Circuits' differentiation between collectively-bargained and non-collectively-bargained benefits as an unnecessary interpretive distinction. For example, in *Skinner Engine, supra*, the Third Circuit expressly rejected the "*Yard-Man* inference" toward the vesting of collectively-bargained retiree health benefits, finding that this inference is illogical and possibly contrary to Congress' intent. *Id.* at 141. Instead, the court held that interpretation of the arguably ambiguous contract language should be performed according to standard rules of contract interpretation. *Id.* In another case, the Third Circuit expressly adopted the *Sprague* reasoning (that an employer's commitment to vest retiree health care is not to be "inferred lightly") in a case in which, unlike *Sprague, collectively-bargained* benefits were at issue. *See Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 135 (3d Cir. 1999).

The Fifth, Seventh and Eighth Circuits, have also declined to follow *Yard-Man*. *See United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1261 n.12 (5th Cir. 1990); *Bidlack, supra*, 933 F.2d at 613, 620; *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989). In the decision below, Chief Judge Posner states: "The distinction

between collective bargaining agreements and ERISA plans is not recognized in our cases, and we are not minded to embrace it now and make the law even more complicated that it is" (App. 7). As Judge Easterbrook's dissenting opinion in *Bidlack* opined, "uncertainty now reigns." 933 F.2d at 620.

C. An Objective and Uniform Framework for Analysis of Past Collective Bargaining Agreements Is Needed.

The Seventh Circuit's apparent intent in *Bidlack* and in the present decision was to provide a default rule largely so that parties *currently* engaged in collective bargaining now and in the future would be able to frame the language in their agreements so as to attain the mutually intended result. "[A]s word of the *Bidlack* presumption spreads and collective bargaining agreements are renegotiated, it will become obvious to unions that if they want to assure that employer-paid health benefits for the workers they represent are vested they will have to insist on explicit language to this effect" (App. 7). The horse, however, is already out of the barn. Virtually no employers and no unions worth their salt today fail to recognize the importance of this issue when drafting collective bargaining agreements. But it is impossible for employers to go back and renegotiate language used in collective bargaining agreements that were previously executed and under which employees have long retired. The collective bargaining agreements that must be interpreted today are those drafted in the 1960s, 1970s and 1980s. The parties cannot go back in a time machine and

be more careful this time to make sure that their intent is accurately recorded.

Judge Easterbrook's dissenting opinion in *Bidlack* is compelling, 993 F.2d at 618-19:

> Someone asked in 1990 what he "understood" about the meaning of an agreement reached in 1965 may remember and report not what he actually thought in 1965 but what occurs to him today. And what he remembers today may turn out to be whatever serves his interests today. Even for witnesses who seek to report accurately, cognitive dissonance produces a remarkable consonance between events *as they recall them* and their contemporary interests. Juries may be good at nosing out liars, but the problem in using memories and understandings is that there will be disagreement even when no one plays false to his recollections. We will have only conflicting understandings, memories, and hopes. Divergence in reported beliefs increases as the events retreat and as the parties no longer need accommodate. These collective bargaining agreements were written for unions, managers, and arbitrators in living relations, not for juries in dead ones. Once the plant has closed, it is all too easy for jurors to award a bundle to their neighbors at the expense of a distant corporation. After a week-long trial in *Senn* it took the jury exactly 20 minutes to conclude that the agreements had established vested benefits, 951 F.2d at 812, although this court thought that there was no evidence at all to that effect.

A default rule for parties engaged in collective bargaining today is not what is called for in these cases.

What is missing from the law is a default rule of interpretation for parties litigating over the intent that was reduced to contract decades ago. The rule is not so much for the employers and unions but for the district courts, so that they may objectively assess the merits of the respective arguments of the litigants. This rule or rules must provide a uniform framework for interpretation of these commitments as opposed to the hodgepodge of Circuit Courts of Appeals' decisions, which provide no meaningful or reliable rules on which the parties to such agreements can rely.

For many years, the duration of retiree health care benefits has depended in large part on factors that should not be relevant, including whether the clause was contained in a collective bargaining agreement or in a benefit plan document, or whether the employee was in the Third Circuit or in the Sixth Circuit. If the decision in the case below is allowed to stand, the interpretation of retiree health care benefit provisions will deteriorate further into analyses of what other employers have done and whether women live longer then men. We are now too far removed from the traditional principles of contract interpretation that the Circuit Courts of Appeals have espoused but have not followed.

A decade ago, the Court granted *certiorari* in *Firestone v. Bruch*, 489 U.S. 101 (1989), to resolve the critical issue of the standard of review to be exercised by courts in reviewing the determinations of benefit plan administrators. Today, the Court faces a similarly compelling need to resolve critical issues of interpretation concerning past retiree health care benefit commitments where literally millions of individuals face uncertainty and unnecessary litigation.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE DECISION BELOW CREATES GREATER UNCERTAINTY BY INVITING PARTIES TO SEEK TRIAL BY ALLEGING "LATENT AMBIGUITIES" WHERE NONE EXIST.

In the decision below, the Seventh Circuit found no ambiguity in the language of the collective bargaining agreement, but signaled it found a "latent ambiguity" with the statement: "anyone knowledgeable about the real-world context of the agreement would realize that it might not mean what it says" (App. 14). If not rejected by the Court, this misunderstanding of latent ambiguity would reduce the status and function of written contractual words to mere warped reflections of "actual" or "reasonably objective" intent to be corrected by the clarifying prism of the "real world."

The practical effect of the lower court's reasoning is equally alarming. If the "real world" theory of ambiguity were to become the law, far fewer meritless disputes could be disposed of on summary judgment. Any party with competent counsel should be able to devise some view of the "real world" that supports their desired interpretation of a contract – no matter how plainly stated the words in the contract might be. Thus, labor contract language negotiated in the past could easily be subverted by competing descriptions of the "real world." But, the possibility of "real world" explanations of meaning does not, and should not, make every contract latently ambiguous. By its decision in this case, the Seventh Circuit has carved out an unwarranted and dangerous path around summary judgment that others will follow if not reversed by this Court.

Softening the summary judgment standard (or eviscerating it altogether) and throwing every contract case to the vagaries of the jury is especially inappropriate in the present context. The issue whether retiree health care benefits survive an expired collective bargaining agreement affects millions of retirees and billions of dollars. Some agreements address and answer the question directly. Others address it in a patently ambiguous way, and still others are silent on it. Must there be a jury trial in each disputed case, regardless of the collective bargaining agreement text? Absolutely not.

A. Traditional Latent Ambiguity Requires an Expressed Term.

The concept of "latent ambiguity" has roots at least as far back as Sir Francis Bacon's Maxim 25. *See* McBaine, *The Rule Against Disturbing Plain Meaning of Writings*, 31 Cal. L. Rev. 145, 147 (1943). After 1864, however, the S.S. Peerless (or more accurately both of them) became the enduring example of latent ambiguity. *See Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864). In this case, the Seventh Circuit cited the Peerless case, but then missapplied the underlying concept en route to its decision finding latent ambiguity (App. 4-5).

In *Raffles*, the term "Peerless" was *expressed* in the contract. On its face, there was nothing unclear about it. But the "real world" existence of two ships Peerless was an extrinsic objective fact of which neither party was aware when the contract was made. The potential double meaning of the expressed term made it ambiguous. And,

because the term had been clear on its face, the ambiguity was latent, not patent.

The contract in *Raffles* was certainly *not* silent on which ship would carry the cotton. Silence is not ambiguity – patent or latent. Indeed, in the case below the Seventh Circuit reiterated that fundamental distinction: "[the *Bidlack* presumption against vesting] can be knocked out by a showing of genuine ambiguity, either patent or latent, *beyond silence*" (App. 5) (emphasis added). The court then erroneously proceeded to find the silent collective bargaining agreement text here at issue latently ambiguous.

B. Cases Demonstrate How to Apply Latent Amibiguity.

Until this case, the Seventh Circuit had never applied a broad, "real world" theory of latent ambiguity and had instead adhered to a narrow, Peerless model. For example, in *Miller v. Taylor*, 39 F.3d 755 (7th Cir. 1994), a ten-year post-employment consultation and noncompetition agreement included an expression that the departing employee "shall be entitled to participate in . . . the medical reimbursement plan." *Id.* at 757. It was an objective extrinsic fact that only full-time employees were eligible for the medical reimbursement plan under terms imposed by the employer's insurer. Thus, when the departed employee was later de-listed by the employer's insurer, the question arose: was the term "medical reimbursement plan" intended to mean the plan according to the terms of the employer's insurer (even if those terms exclude the departed employee) or was it intended to

mean the employer would provide the equivalent of such a plan? The court identifed this as a question of latent ambiguity, discussed the Peerless example, and remanded the case because the district court had not considered whether the claimed interpretations of the respective parties were both reasonable. The contract in *Miller* was not silent about the medical reimbursement plan. Instead, the case was remanded to discover whether the parties had in fact attached two different, reasonable understandings of the *expressed term* – just as the parties in *Raffles* attached two different, reasonable understandings to the *term* "Peerless."

Indeed, the cases cited by the Seventh Circuit in the decision below in support of the broader "real world" view are seen to conform to the narrower Peerless model on closer inspection. In *Anstett v. Eagle Picher Industries, Inc.*, 203 F.3d 501 (7th Cir. 2000), the disputed contract text (from a benefit plan) provided: "Salaried employees *terminated* other than for cause or voluntary separation, due to the exigencies of the business situation, will be entitled to [separation] benefits." *Id.* at 503 (emphasis added). The employer wanted to use objective extrinsic evidence, in the form of statements excerpted from an employee handbook, to show the parties did not intend the term "terminated," in the benefit plan, to include employees hired into other employment immediately after termination (thus suffering no period of unemployment). But the court refused to go beyond the plain language of the contract because it was not ambiguous. The Seventh Circuit cited *Anstett* in the present case, but failed to apply it correctly. A contract does not contain a

latent ambiguity whenever a "real world" result arises that was not addressed in the agreement.

Similarly, there was no latent amgibuity in another case cited by the Seventh Circuit here, *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032 (7th Cir. 1998). In that case a party argued that extrinsic evidence should be allowed to show that a word stated in the singular – "target" – was actually meant in the plural. But the court would have none of it: "The contract *has no provision* for multiple targets. *We cannot add such a term.* ***[T]here is no ambiguity to construe against the drafter or to clear up by appeal to extrinsic evidence. We apply the language of the contract as written." *Id.* at 1039 (emphasis added).

C. The Seventh Circuit Has Inadvertently Transformed Latent Ambiguity By Failing to Apply It Carefully.

The foregoing cases make it clear that the concept of latent ambiguity can be applied carefully and correctly. So, why did the Seventh Circuit go so far afield in this case? Part of the reason stems from a recurring jurisprudential problem once eloquently described by Chief Judge Posner:

> Rules of law are rarely as clean and strict as statements of them make them seem. So varied and unpredictable are the circumstances in which they are applied that more often than not the summary statement of a rule – *the terse formula that judges employ as a necessary shorthand* to prevent judicial opinions from turning into treatises – is better regarded as a generalization than as the premise of a syllogism.

AM International, Inc. v. Graphic Management Associates, Inc., 44 F.3d 572, 575 (7th Cir. 1995). The problem judicial shorthand creates is that the slightest inaccuracy or over-simplification included in the shorthand can build a momentum of its own and seem to become the law by unexamined, boiler-plate inclusion in later cases.

In the decision below, the rule of latent ambiguity has become a victim of jurisprudence by judicial shorthand. This can be shown by following the authorities in the decision below upstream. In so doing, one quickly discovers that the accepted judicial shorthand does not conform to the principles actually applied in the cases.

For example, the court twice cited *Stone v. Container Corp.*, 165 F.3d 1157, 1162 (7th Cir. 1999) in support of its "real world" view (App. 4, 5). At the cited pages, *Stone* provides this incautious misstatement of latent ambiguity: "A patent ambiguity in a contract is one that is apparent from just reading the contract. A latent ambiguity arises when, although the contract is clear 'on its face,' *anyone knowing the background would know* that it didn't mean what it seems to mean." *Id.* at 1162. But *Stone* cannot be an authority on latent ambiguity, as the court did not apply the concept and explicitly identified its passing comment as dicta. *Id.* The court simply dropped a bit of judicial shorthand, with a citation to an earlier case. Thus, *Stone* was no more than the carrier of a virus – not an authority for the court's new "real world" view.

Taking the next step back, examination of the case underlying the judicial shorthand in *Stone* reveals the source of the inaccuracy. That case, *AM Int'l, supra*, 44 F.3d 572 (7th Cir. 1995), involved a dispute over language

in a settlement agreement resolving a patent dispute. Chief Judge Posner rightly rejected finding a latent ambiguity in that case. Unfortunately, his opinion also included a few extraneous lines that became the source of the inaccurate judicial shorthand in the later cases.

AM Int'l warrants special attention because it demonstrates a correct application of latent ambiguity. Specifically, Chief Judge Posner refused to find that a latent ambiguity could be created by a certain sort of objective extrinsic evidence:

> [The party's] affidavits do not create a factual issue concerning the existence of an extrinsic ambiguity. The strongest of them is the affidavit of a patent expert who opined that "In my 30 years of patent practice, I have never seen, handled or heard of a patent license in which there was a royalty exclusion window [of the kind suggested by GMA]." *What does that prove? That such a provision is unusual?* That AM was fooled? It is not evidence that the parties were employing a special vocabulary, so that the meaning of the contract is opposite to what an outsider would think. *It is not the sort of evidence that would authorize a jury to ignore the language of the contract.* So the judge was right to grant GMA's motion, though he should have said that he was ruling on a motion for summary judgment . . . .

Id. at 578 (emphases added). That reasoning was exactly right. Proper rules of contract interpretation do not depend on what non-parties have or have not done. A latent ambiguity does not arise depending upon what contracts between other parties say or do not say. A latent ambiguity does not arise because women tend to live

longer than men. No tenable theory of latent ambiguity would extend the boundary of admissible extrinsic evidence, even if objective, to those extremes.

D. The Objective Extrinsic Evidence Used to Create a Latent Ambiguity in This Case Should Have Been Rejected.

The objective extrinsic evidence utilized by the Seventh Circuit to find a latent ambiguity should have been easily rejected. First, the quality of the evidence is equal to or less than the quality of the evidence rejected in *AM Int'l*. More importantly, if extrinsic evidence of the type accepted in this case is allowed to create latent ambiguities in future cases, *Rosetto* would likely become the model by which the vast majority of retiree health care benefits cases would go to a jury.

Three pieces of objective extrinsic evidence were identified and accepted by the Seventh Circuit in the decision below. First, Pabst amended a different agreement with a different union to expressly limit retiree health care benefits. The echo of Chief Judge Posner's question in *AM Int'l* should have immediately leapt out: What does that prove? But the court accepted the evidence because the other contract concerned more employees than the contract at issue. Thus, it "would be *natural* for Pabst to be *more concerned* about the cost of lifetime benefits for the former than for the latter" (App. 11). At step one, this is a curious piece of faulty economic analysis: Couldn't Pabst, like any business, be concerned about cost in *both* contracts? The legitimate cost concerns facing Pabst and any other business do not lie along a

curve of the type suggested – they are present in all areas. But, even if the economics were correct, the problem would remain – this evidence doesn't prove anything.

The second piece of extrinsic evidence was that a different brewer provided retiree health care benefits beyond the term of a different collective bargaining agreement that contained language identical to the text here at issue. What does that prove? Pabst's contractual obligations cannot be held to turn on how other parties have behaved under other contracts. Moreover, if the faulty economic analysis used to justify the first piece of extrinsic evidence were applied equally to the second piece, the court could not have reasonably drawn *any* inference unless it first knew whether the number of retired machinists in the other brewer's case was greater than, equal to, or less than forty-five (45). If it were less, the court should have disregarded this evidence under its own reasoning because it would only be natural for the other brewer to have been less concerned about cost than Pabst.

Third, the court accepted a possible inference from the objective extrinsic evidence that male employees and retirees are often outlived by their wives and children. By accepting this kind of "evidence," the Seventh Circuit demonstrated just how silly contract interpretation would necessarily become under the "real world" doctrine of latent ambiguity. Again, what can this evidence possibly prove? If the Seventh Circuit's erroneous application of latent ambiguity in this case goes unreversed, advocates in future cases would need only reach for the Statistical Abstract of the United States or a good almanac to find "objective extrinsic evidence" creating latent ambiguities

in disputed contracts. The importance of contract language would be reduced to simply one factor among many, and the possibility of summary judgment based on clear contract language would likely be limited to cases involving incompetent or unimaginative counsel.

The Seventh Circuit's re-invention of "latent ambiguity" in the decision below should be rejected by this Court. The obvious practical effect of the decision, if unreversed, would be to invite retiree health care benefits litigants to allege the existence of latent ambiguities in collective bargaining agreements or benefit plan documents in order to unnecessarily litigate cases that should be disposed of on summary judgment.

The practical harm of *Rosetto* would not be limited to the Seventh Circuit. In the dense fog of legal uncertainty concerning the question here presented, courts and litigants frequently use developments in other circuits as guideposts. If unreversed, *Rosetto* will send the wrong signal. Whatever rule of interpretation the Court might ultimately provide in deciding this case, it should be clear that the *Rosetto* model – applying "latent ambiguity" so broadly that a vast majority of cases go to the jury – is not a rule of interpretation at all and would produce unfair, burdensome and unacceptable results.

CONCLUSION

Litigation of this sort unfortunately but inexorably requires courts to sift through the remains of long-dead collective bargaining agreements. Rather than a consistent framework, fortuity of geography has determined

the results. The Seventh Circuit misunderstood its mission in this case. In discerning whether a real ambiguity existed, it did not just sift through the remains of a dead collective bargaining agreement – it made an over-reaching attempt to send a signal to the drafters of future ones. If unreversed, the decision of the Seventh Circuit in this case would further complicate an already severe interpretive fissure between the circuits. It would also unnecessarily resurrect hopes of obtaining jury trials to dispute old agreements.

For all of the above reasons, the petition for a writ of *certiorari* should be granted.

Dated this 28th day of December, 2000.

Respectfully submitted,

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In the
United States Court of Appeals,
for the Seventh Circuit.

No. 99-4076

FRANK M. ROSETTO, *et al.*, individually and as representatives of a class of similarly situated persons,

Plaintiffs-Appellants,

v.

PABST BREWING COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 96-C-1086
William E. Callahan, Jr., *Magistrate Judge.*

ARGUED MAY 18, 2000 – DECIDED JUNE 29, 2000

Before POSNER, *Chief Judge,* and DIANE P. WOOD and WILLIAMS, *Circuit Judges.*

POSNER, *Chief Judge.* This appeal from the grant of summary judgment in favor of the defendant requires us to reconsider the much-litigated issue of when a right to health benefits that is granted to retired workers by a collective bargaining agreement (or an ERISA plan, but that is not this case) survives the termination of the

agreement. See, e.g., *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (en banc); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434 (7th Cir. 1998); *Frahm v. Equitable Life Assurance Society*, 137 F.3d 955 (7th Cir. 1998); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996); *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995); *Maurer v. Joy Technologies, Inc.*, No. 98-3964, 2000 WL 572453 (6th Cir. May 12, 2000); *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999); *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130 (2d Cir. 1999); *Int'l Ass'n of Machinists & Aerospace Workers v. Masonite Corp.*, 122 F.3d 228 (5th Cir. 1997). The issue must be decided as a matter of federal common law developed under the authority of section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, as interpreted in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); see also *United Steelworkers of America v. Rawson*, 495 U.S. 362, 368 (1990); *In re Bluffton Casting Corp.*, 186 F.3d 857, 862 (7th Cir. 1999), or, in the case of an ERISA plan, under the authority of ERISA. E.g., *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55-56 (1987); *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir. 1990) (en banc); *Trustmark Life Ins. Co. v. University of Chicago Hospitals*, 207 F.3d 876, 881 (7th Cir. 2000).

The plaintiffs complain not only about the grant of summary judgment in favor of the defendant but also about the district court's denial of their discovery motion. The latter complaint has no possible merit. The motion was filed two months after the date set by the court for the completion of discovery. The plaintiffs gave (and give) no excuse for their tardiness, and so have no

grounds for complaining about the district court's welcome effort to expedite the litigation and spare the parties the expense of protracted discovery, the bane of modern litigation.

The plaintiff class consists of some 45 retired machinists formerly employed at Pabst's brewery in Milwaukee, plus their spouses and dependents. The members of the class received health benefits under successive collective bargaining agreements between Pabst and the machinists' union until 1995, when the last such agreement expired (Pabst closed the brewery the following year). They claim that the agreements gave them a vested right to such benefits. The agreements contain three provisions, essentially unchanged from agreement to agreement, conferring benefits on retired employees and their dependents, that bear on this case: (a) Blue Cross and Blue Shield medigap insurance for retirees enrolled in Medicare, plus a Blue Cross-Blue Shield prescription drug program except insofar as the retiree "may become eligible [for a similar benefit] as a result of any future hospital-surgical legislation"; (b) for those retirees not enrolled in Medicare, the same coverage as for active employees; (c) "the coverage described in subsections (a) and (b) shall continue for the covered dependents of a deceased retired employee to the end of the sixth month following the month in which death occurs."

Pabst argues that it is clear from these provisions that they are effective only during the term of the collective bargaining agreement that contains them. If this is right – if someone who read these provisions without knowing anything about their background or real-world context would say, "Yes, it sure looks as if the provisions are in

effect only for the term of the agreement in which they appear" – then Pabst is off the hook as a matter of law (that is, the case would not reach the jury) unless the plaintiffs can adduce (1) objective evidence of (2) a latent, or, as it is sometimes called, an extrinsic, ambiguity. E.g., *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 614-15 (7th Cir. 1998); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466-67 (7th Cir. 1998); *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 F.3d 562, 568 (7th Cir. 1995); *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Skinner Engine Co., supra*, 188 F.3d at 145. A latent ambiguity is an ambiguity (that is, something that makes it possible to interpret a document reasonably in more than one way, e.g., *Anstett v. Eagle-Picher Industries, Inc.*, 203 F.3d 501, 503 (7th Cir. 2000); *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1037 (7th Cir. 1998); *Computrol, Inc. v. Newtrend, L.P.*, 203 F.3d 1064, 1070 (8th Cir. 2000)) that is recognized as such only when a contract clear on its face – clear, that is, to the uninformed reader – is applied to a particular dispute. *Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co.*, 165 F.3d 1157, 1162 (7th Cir. 1999); *PMC, Inc. v. Sherwin-Williams Co., supra*, 151 F.3d at 614; *AM Int'l, Inc. v. Graphic Management Associates, Inc.*, 44 F.3d 572, 575 (7th Cir. 1995); *GenCorp, Inc. v. American Int'l Underwriters*, 178 F.3d 804, 818 (6th Cir. 1999); *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1167 (D.C. Cir. 1995). The contract in *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864), for example, called for the shipment of cotton on the ship *Peerless*, which seemed clear enough; only it turned out that more than one ship of that name would be sailing from the same port – a fact that once revealed showed that the

contract actually was ambiguous, because it was uncertain to which ship the contract referred. And the existence of the two ships was an "objective" fact in the sense, necessary to keep the latent-ambiguity doctrine from destroying reliance on written contracts, that establishing the fact did not require determining the credibility of a party's self-serving testimony.

The doctrine of latent ambiguity comes into play, as we have said, only if someone who read the contract without knowledge of its real-world context of application would think it clear. If even this innocent reader would find the contract unclear – if, that is, an ambiguity is apparent just from reading the contract without having to know anything about how it interacts with the world – then the contract has what is called a patent, or intrinsic, ambiguity, and evidence is admissible to cure it. E.g., *Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co., supra,* 165 F.3d at 1161-62; *Home Ins. Co. v. Chicago & Northwestern Transportation Co.,* 56 F.3d 763, 767-68 (7th Cir. 1995).

So far we have been describing general contract law, rather than anything special to the issue of "vested" employee health benefits (that is, benefits that continue beyond the expiration of the contract creating them). Our en banc decision in *Bidlack* established a presumption that an employee's entitlement to such benefits expires with the agreement creating the entitlement, rather than vesting, but the presumption can be knocked out by a showing of genuine ambiguity, either patent or latent, beyond silence. *Bidlack v. Wheelabrator Corp., supra,* 993 F.2d at 606-07; see also *Pabst Brewing Co. v. Corrao, supra,* 161 F.3d

at 440; *Diehl v. Twin Disc, Inc., supra,* 102 F.3d at 306; *Murphy v. Keystone Steel & Wire Co., supra,* 61 F.3d at 565.

Cases in other circuits are all over the lot. Some presume vesting. E.g., *Maurer v. Joy Technologies, Inc., supra,* 2000 WL 572453, at *6. Some insist that there be express language to that effect. E.g., *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Skinner Engine Co., supra,* 188 F.3d at 139-47; *Gable v. Sweetheart Cup Co.,* 35 F.3d 851, 855 (4th Cir. 1994). Some presume nothing. E.g., *Deboard v. Sunshine Mining & Refining Co.,* 208 F.3d 1228, 1240-41 (10th Cir. 2000); *Chiles v. Ceridian Corp.,* 95 F.3d 1505, 1511-14 (10th Cir. 1996); *Joyce v. Curtiss-Wright Corp., supra,* 171 F.3d at 134-35; *Barker v. Ceridian Corp.,* 122 F.3d 628, 634-38 (8th Cir. 1997); *Int'l Ass'n of Machinists & Aerospace Workers v. Masonite Corp., supra,* 122 F.3d at 231-32.

One case holds that benefits are presumed to vest if they are conferred by a collective bargaining agreement rather than an unbargained-for ERISA plan, on the theory that employee interests are more likely to be reflected in a negotiated agreement than in one presented to employees as a condition of their employment. *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Yard-Man, Inc.,* 716 F.2d 1476 (6th Cir. 1983); contra, *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Skinner Engine Co., supra,* 188 F.3d at 139. Several cases adopt the opposite presumption when (but only when) the benefits are conferred in an ERISA plan. E.g., *Sprague v. General Motors Corp.,* 133 F.3d 388, 400 (6th Cir. 1998) (en banc); *Maurer v. Joy Technologies, Inc., supra,*

at *6. It can be argued that a reversal of these presumptions would make better sense – that if the union negotiated for such rights, they would surely appear in the collective bargaining agreement, whereas an employee ought to get the benefit of vague language in his ERISA plan. The distinction between collective bargaining agreements and ERISA plans is not recognized in our cases, and we are not minded to embrace it now and make the law even more complicated than it is. What is clear and worth remarking, however, is that the interpretive problem will diminish, at least in this circuit, in the collective bargaining setting. For as word of the *Bidlack* presumption spreads and collective bargaining agreements are renegotiated, it will become obvious to unions that if they want to assure that employer-paid health benefits for the workers they represent are vested they will have to insist on explicit language to this effect.

Our presumption against vesting, it is important to emphasize, kicks in only if all the court has to go on is silence. If there is some positive indication of ambiguity, something to make you scratch your head (but the "something" must be either language in the plan or contract itself or the kind of objective evidence that can create a latent ambiguity under principles of contract law, *Murphy v. Keystone Steel & Wire Co., supra,* 61 F.3d at 565), the presumption falls out. The presumption is thus a default rule, that is, a rule to be applied when there is no other evidence, *Bidlack v. Wheelabrator Corp., supra,* 993 F.2d at 607, 609; E. Allan Farnsworth, *Contracts* § 7.16, p. 498 (3d ed. 1999), or what in earlier parlance was called an exploding presumption – one that disappeared once evidence was introduced, as distinct from an evidentiary

presumption, which might continue to weigh in the decision maker's balance after other evidence came in. Language in *American Federation of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 980 n. 3 (2d Cir. 1997), might lead a reader to think that *Bidlack* created an evidentiary presumption; it did not.

Bidlack enables the employer to fend off a trial without having thought to have included in the contract an express provision limiting the duration of the benefits. The presumption plugs the interpretive hole that would otherwise be left by silence about duration. But it remains open to a plaintiff to show that the relevant contractual provisions contain either patent or latent ambiguities.

Begin with patent ambiguity and recall the three provisions that bear on the issue of post-termination rights: (a) Blue Cross and Blue Shield medigap insurance for retirees enrolled in Medicare, plus a Blue Cross-Blue Shield prescription drug program except insofar as the retiree "may become eligible [for a similar benefit] as a result of any future hospital-surgical legislation"; (b) for those retirees not enrolled in Medicare, the same coverage as for active employees; and (c) "the coverage described in subsections (a) and (b) shall continue for the covered dependents of a deceased retired employee to the end of the sixth month following the month in which death occurs." That the coverage in (c) is to continue for a specified time after the retiree dies sets at least an outer limit. But with regard to the duration of the benefits granted by (a) and (b), benefits sought in this case along with dependents' benefits, the contract is silent except insofar as the reference to future legislation in (a) might be thought to point beyond the expiration of the contract,

which seems to us a weak inference. While there is no qualification explicitly negating such an inference – no "unless the collective bargaining agreement has expired" or "during the term of this agreement," the latter being the formula that we held in *Pabst Brewing Co. v. Corrao* eliminated any patent ambiguity – neither is there any language to suggest that these benefits survive the expiration of the agreement.

It is unclear whether the reference to coverage in clause (b) refers only to the scope of the benefits or also to how long they are to last, though the former seems the more natural meaning to impress on the words, which means that (b) is silent on duration. As is clause (a) – a silence that Pabst argues is pregnant in light of (c), which does mention duration, though not vesting. But the contrary inference to what Pabst seeks to draw from the comparison is as plausible. Dependent coverage, the subject of clause (c), would often continue for a very long time were it not truncated by the six-month provision. Retirees' dependents will generally be younger than retirees, as they may include children. And either because they are younger or because they are women – and retirees' spouses will generally be both, since most of Pabst's maintenance workers we may assume were men, and wives are on average younger than husbands – they will tend to have a longer life expectancy. True, the children will no longer be entitled to medical benefits once they reach adulthood and so cease to be dependents; nevertheless dependent coverage is more open-ended from a durational standpoint than coverage limited to retirees. And true too, the younger the dependents are, the lower their expected health costs are expected to be in

the near term; but by the same token, if they are under 65 they are ineligible for Medicare and so may cost the employer more in health benefits than retirees do, since the benefits granted by the collective bargaining agreement are supplementary to Medicare. For these reasons an employer might want to specify a time limit short of death for dependent benefits yet feel no similar need to limit the duration of retirees' benefits.

A search for patent ambiguity must canvass the entire agreement. A provision that seems ambiguous might be disambiguated elsewhere in the agreement. E.g., *St. Paul Fire and Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195, 1199 (1st Cir. 1994); *Kass v. Kass*, 696 N.E.2d 174, 180-81 (N.Y. 1998). Pabst points us to the provision concerning active (as opposed to retired) employees and notes that the benefits conferred on them include "dependent children from age twenty-five (25) for life if totally and permanently disabled." But in arguing that this shows that the agreement is explicit when it means to confer lifetime benefits, Pabst overlooks the fact that *obviously* the benefits of active employees are only for as long as the collective bargaining agreement is in effect, since otherwise the employer's potential liabilities would be staggering. That is so obvious that if there is to be an exception (this fortunately tiny exception for permanently disabled children), we *expect* it to be explicit, not implicit.

But while Pabst has not proved that the contract clearly excludes vesting, we doubt that the plaintiffs have rebutted the *Bidlack* presumption by demonstrating a patent ambiguity. For when all the toing-and-froing is done, the fact remains that the clauses on which the plaintiffs

mainly rely, clauses (a) and (b), are completely silent on duration, in contrast to *Bidlack*, where the collective bargaining said that "those employees who have retired since September 22, 1959 will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company *after they attain sixty-five (65) years of age*" and that those benefits "shall be continued for the spouse after the death of the retiree." 933 F.2d at 605-606 (emphasis added); and see *id.* at 608. But we need not pursue the issue, as there is latent ambiguity here. The bulk of the workers at Pabst's Milwaukee brewery belonged to the brewery workers' union rather than, as the plaintiffs here did, to the machinists' union. Although these are separate unions, they negotiated essentially identical collective bargaining agreements, concerning health and welfare benefits at any rate, with Pabst – with a pregnant exception: In 1984 the collective bargaining agreement between Pabst and the brewery workers' union was amended to limit health and welfare benefits for the "term of this agreement." *Pabst Brewing Co. v. Corrao, supra,* 161 F.3d at 435-36. No similar amendment was ever made to the agreement with the machinists, and the reason may be that there were so many more retired brewers than retired machinists – 700 plus, versus only 45. It would be natural for Pabst to be more concerned about the cost of lifetime benefits for the former than for the latter. Another bit of evidence favoring the plaintiffs is that Schlitz Brewing Company, which had a collective bargaining agreement with the machinists' union that was identical to the agreement at issue in this case, continues to this day to provide health insurance to the retired machinists of its Milwaukee facilities, which it closed in

1981, *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 997 (7th Cir. 1993), after the expiration of the agreement. The point we made earlier, about the possible inference from (c) and the different average ages of retirees and their spouses and dependents, reappears as another bit of extrinsic evidence (extrinsic because the ages of the retirees, their spouses and dependents, do not appear in the contract) in support of the plaintiffs' interpretation.

Such evidence does not prove that that interpretation is correct, but it shows that the silence of the collective bargaining agreement with respect to vesting makes the agreement genuinely ambiguous and not merely incomplete. If it were merely incomplete, the *Bidlack* presumption would complete it and defeat the plaintiffs' case.

These items of evidence are "objective" in the sense (the relevant sense) that either they can be established by disinterested witnesses, or they are uncontested, or, as here, they are both. *PMC, Inc. v. Sherwin-Williams Co., supra*, 151 F.3d at 614; *Mathews v. Sears Pension Plan, supra*, 144 F.3d at 467; *AM Int'l, Inc. v. Graphic Management Associates, Inc., supra*, 44 F.3d at 575. Evidence is not objective when it is the self-serving testimony of one party to the contract as to what the contract, clear on its face, "really" means, contrary to what it seems to mean. *Id.*; *PMC, Inc. v. Sherwin-Williams Co., supra*, 151 F.3d at 614-15; *Bank v. Truck Ins. Exchange*, 51 F.3d 736, 737 (7th Cir. 1995); *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Skinner Engine Co., supra*, 188 F.3d at 146. The plaintiffs want us to consider such testimony as well – testimony that a Pabst official, now

conveniently dead, told the union that retirees had lifetime coverage. That testimony is self-serving, unverifiable, and therefore inadmissible to create a latent ambiguity.

But it is important to note that once a contract is found by the court to be patently or latently ambiguous, then (in most jurisdictions, in any event, and in the federal courts) any evidence that would normally be admissible in a trial becomes admissible to show what the contract meant. *Dawn Equipment Co. v. Micro-Trak Systems, Inc.*, 186 F.3d 981, 987 (7th Cir. 1999); *In re Modern Dairy of Champaign, Inc.*, 171 F.3d 1106, 1109 (7th Cir. 1999); *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 417 (1st Cir. 2000); *Charter Oil Co. v. American Employers' Ins. Co., supra*, 69 F.3d at 1168. This is more often assumed than articulated, but *Charter Oil* is a square holding, and we think it makes sense and therefore retract our contrary, and unreasoned, dictum in *Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co., supra*, 165 F.3d at 1162. For, with the exception of the parol evidence rule (usually regarded, however, as a substantive rule of contract law rather than a rule of evidence, *AM Int'l, Inc. v. Graphic Management Associates, Inc., supra*, 44 F.3d at 576; *Mohr v. Metro East Mfg. Co.*, 711 F.2d 69, 72 (7th Cir. 1983); *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1309 n. 47 (11th Cir. 1998); Farnsworth, *supra*, § 7.2, pp. 428-30), there are no special evidentiary rules for the trial of a breach of contract case. The rules concerning ambiguity are applied *before* trial, to see whether there is a triable issue. E.g., *AM Int'l, Inc. v. Graphic Management Associates, Inc., supra*, 44 F.3d at 575; *GenCorp, Inc. v. American Int'l Underwriters, supra*, 178 F.3d

at 818. The rules function as gatekeepers, to prevent a disappointed contract party from ginning up a fishy story about what the contract really meant but didn't say. They are not rules of evidence governing the admissibility of evidence offered at trial, once ambiguity is found. For example, a union officer's testimony to what a company official once said the contract (which he had participated in negotiating) meant, although not usable to establish a latent ambiguity, would presumably be admissible at trial as the admission of a party opponent. Fed. R. Evid. 801(d)(2)(D).

To summarize the rule of law that we apply, and that requires reversal and a trial:

1. If a collective bargaining agreement is completely silent on the duration of health benefits, the entitlement to them expires with the agreement, as a matter of law (that is, without going beyond the pleadings), unless the plaintiff can show by objective evidence that the agreement is latently ambiguous, that is, that anyone knowledgeable about the real-world context of the agreement would realize that it might not mean what it says. This is the *Bidlack* presumption and its latent-ambiguity rebuttal.

2. If the agreement makes clear that the entitlement expires with the agreement, as by including such a phrase as "during the term of this agreement," then, once again, the plaintiff loses as a matter of law unless he can show a latent ambiguity by means of objective evidence. This is a general rule of contract law, independent of but consistent with *Bidlack*.

3. If there is language in the agreement to suggest a grant of lifetime benefits, and the suggestion is not

negated by the agreement read as a whole, the plaintiff is entitled to a trial. Of course, if the agreement expressly grants such benefits, the plaintiff is entitled, not to a trial, but to a judgment in his favor. We are speaking of a case in which merely suggestive language creates a patent ambiguity.

4. If the plaintiff is entitled to a trial by reason of either a patent or a latent ambiguity, the normal rules of evidence will govern the trial, and so the parties will not be limited at trial to presenting *objective* evidence of meaning.

We trust that these simple rules will guide, and perhaps reduce (by facilitating settlement), further litigation over lifetime benefits in collective bargaining agreements and ERISA plans, and maybe litigation over other types of contract as well.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: June 29, 2000

BEFORE: Honorable RICHARD A. POSNER,
Chief Judge

Honorable DIANE P. WOOD, Circuit Judge

Honorable ANN CLAIRE WILLIAMS,
Circuit Judge

No. 99-4076

FRANK M. ROSSETTO, JERRY SKIDMORE,
JOHN S. BOROWSKY, et al.,

Plaintiffs-Appellants

v.

PABST BREWING COMPANY, INCORPORATED,

Defendant-Appellee

Appeal from the United States District Court for the
Eastern District of Wisconsin
No. 96 C 1086, William E. Callahan, Jr., Magistrate Judge

The judgment of the District Court is REVERSED, with costs, and this case is REMANDED in accordance with the decision of this court entered on this date.

(1061-110393)

United States District Court,
EASTERN DISTRICT OF WISCONSIN

Frank M. ROSSETTO, Jerry Skidmore, John S. Borowsky, Generoso Simons, and Machinists District 10, Individually and as Representatives of a Class of Persons Similarly Situated,

Plaintiffs,

v.

PABST BREWING COMPANY, INC.,

Defendant.

Case No. 96-C-1086.

DECISION AND ORDER

(Filed Nov. 1, 1999)

On September 27, 1996, the Honorable Myron L. Gordon, Senior United States District Judge for the Eastern District of Wisconsin, wrote words that are as true today as they were when he wrote them, and are as applicable to this case as they were to the case then pending before him.

> The union retirees cannot succeed on their claim to vested lifetime health insurance benefits, but I share the humane thoughts made by the late Judge Hubert Will in his concurring opinion in *Senn* [*v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992)]. Although he agreed with his fellow judges on the appellate panel that the language of the collective bargaining agreement

> in that case barred the use of extrinsic evidence and necessitated the denial of lifetime benefits for the retirees, this greatly-admired judge added an expression of sympathy for retirees who have received and relied upon company financed life and health insurance plans for many years and who suddenly find themselves unprotected. This case is not an isolated example and is one of the reasons for the growing demand that some form of national health plan be adopted so that retirees and other persons will be able to afford and secure the medical services they need. *Senn*, 951 F.2d at 818.

Pabst Brewing Company, Inc. v. Corrao, 940 F.Supp. 217, 223-24 (E.D.Wis.1996).

INTRODUCTION AND PROCEDURAL BACKGROUND

This action was commenced on September 19, 1996, when plaintiffs Frank M. Rossetto ("Rossetto"), Jerry Skidmore ("Skidmore"), John S. Borowsky ("Borowsky"), Generoso Simons ("Simons"), and District 10 of the International Association of Machinists and Aerospace Workers AFL-CIO ("District 10") filed this class action against Pabst Brewing Company, Inc. ("Pabst"). The original complaint alleged that a long line of collective bargaining agreements (CBAs) between Pabst and District 10 had provided retirees with health and welfare benefits that outlasted the expiration of the last collective bargaining agreement. Stated another way, the plaintiffs alleged that the last collective bargaining agreement provided for lifetime health and welfare benefits.

The most recent CBA covered the period from June 1, 1993, to June 1, 1995. Upon the expiration of that agreement, and failure of the parties to reach a new agreement, Pabst stopped providing the benefits. Hence, the filing of this lawsuit.

During the early pendency of this lawsuit, by agreements dated November 1, 1996, and December 6, 1996, Pabst voluntarily reinstated the disputed benefits and extended them until January 31, 1997. During this period of time, the parties attempted to resolve the issues raised in the lawsuit. Unfortunately, they were not able to do so. Accordingly, on February 13, 1997, the plaintiffs filed an amended complaint in which they set forth three claims. First, the plaintiffs alleged breach of contract under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. Second, the plaintiffs alleged that Pabst's termination of the benefits constituted a willful violation of the employee benefit plan, actionable under §§ 502(a)(1)(B) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3). Third, the plaintiffs alleged that the entire issue should be arbitrated under § 301 of the LMRA.

On February 27, 1997, Pabst filed a counterclaim for declaratory judgment requesting this court find that Pabst's elimination of the retirees' benefits was not violative of ERISA and was not a breach of its obligations collectively bargained for under § 301 of the LMRA.

On March 4-6, 1997, this court certified the class and conducted an evidentiary hearing relative to the dispute's arbitrability, at the conclusion of which I ordered the

matter to arbitration, issued a status quo injunction pending resolution of the grievance, and ordered Pabst to continue the benefits.

Pabst appealed that ruling to the Seventh Circuit Court of Appeals. Rather than reach the merits of this court's order, however, on October 17, 1997, the Seventh Circuit held that District 10 lacked standing to bring the retirees' grievance to arbitration. Such being the case, District 10 did not have any right to represent the retirees making up the class in this case unless each of the retirees assented to its representation and the record contained evidence in that regard. *See, Rossetto v. Pabst Brewing Company, Inc.*, 128 F.3d 538 (7th Cir. 1997). The Seventh Circuit vacated this court's order compelling arbitration and the injunction on the basis of District 10's lack of standing to bring the retirees' grievance to arbitration. *Rossetto*, 128 F.3d at 541. The matter was remanded for further proceedings in this court consistent with the Seventh Circuit's ruling. By virtue of that ruling, this court's order compelling arbitration and an injunction in aid thereof was vacated. District 10's request for rehearing and suggestion for rehearing en banc was thereafter denied, as was its petition for writ of certiorari. *See Rossetto v. Pabst Brewing Company, Inc.*, 118 S.Ct. 2321 (June 15, 1998).

The Seventh Circuit's ruling, however, did not dispose of the merits of the plaintiffs' claim. To the contrary, Counts I and II of the plaintiffs' amended complaint remained to be resolved by this court. Consequently, I conducted a scheduling conference with the parties, at which time firm dates governing the pretrial processing

of this action were set. Among those dates were deadlines for discovery cutoff and the filing of dispositive motions.

The parties thereafter undertook discovery and, consistent with this court's scheduling order, on March 1, 1999, Pabst filed a motion for summary judgment together with supporting documentation. Pabst's motion has now been fully briefed and is ready for resolution. For the reasons which follow, Pabst's motion for summary judgment is granted.

FACTUAL BACKGROUND

The facts in this case, at least on some fronts, are fairly straight forward. Plaintiffs Rossetto, Skidmore, Borowsky, and Simons are Wisconsin residents and are representatives of the plaintiff class, which class consists of retired Pabst employees who were represented by District 10 during their employment, and their spouses and dependents. Pabst is a Delaware corporation, with its principal place of business in San Antonio, Texas. Pabst previously operated a brewery at 917 W. Juneau Avenue, Milwaukee, Wisconsin, which ceased production at the end of 1996. Pabst and District 10 are parties to a long line of collective bargaining agreements, the most recent of which covered the period from June 1, 1993, to June 1, 1995 (the "Agreement"). The Agreement's health and welfare provisions, i.e. Article VII of the Agreement, contain a "Dependent Benefit Clause" for dependents of retirees at subsection (c) thereof. That subsection states:

> (c) The coverage described in subsections (a) and (b) shall continue for the covered dependents of a deceased retired employee

> to the end of the sixth month following the month in which death occurs.

(Agreement, p. 19).

The 1978 CBA was the first time that the Dependent Benefit Clause was provided for dependents of retirees, and subsection (c) remained a part of each successive contract from 1978 forward.

In order to fully appreciate the significance of the foregoing language, it is helpful to set forth, in more detail, certain portions of Article VII of the Agreement. Section 1 of Article VII provides, in pertinent part, as follows:

> The Company, at its sole cost and expense, shall provide and furnish medical, health, dental, sickness and accident, and life insurance coverage for employees actively at work in the bargaining unit and their dependents (including dependent children from age twenty-five (25) for life if totally and permanently disabled), and also to retired employees and their dependents, subject to the conditions specified herein. Said insurance coverage shall contain a coordination of benefits clause. The insurance coverage shall be purchased by the Company from insurance companies licensed to do business in the State of Wisconsin, and the policies of insurance and Blue Cross and Blue Shield participation contracts shall be in standard form and subject to the usual limitations and exclusions contained in such standard policies.
>
> * * *

For Employees and Dependents:

(a) Pabst Brewing Company Medical and Dental Plan as currently provided.

(b) The Company will offer Family Health Plan and CompCare. If Family Health or CompCare increase their rates by more than twenty percent (20%) in a calendar year, the Company may, at its option, terminate the Plan by giving sixty (60) days notice to the Union. DentaCare is eliminated effective January 1, 1993.

(c) The coverage described in Subsection (a), (b), and (c), shall continue for the covered dependents of a deceased active employee to the end of the sixth month following the month in which death occurred.

For Retired Employees:

A death benefit in the amount of Two Thousand Dollars ($2,000), shall be increased to Four Thousand Dollars ($4,000) for employees retiring on or after August 1, 1978, and further increased to Five Thousand Dollars ($5,000) for employees retiring on or after August 1, 1981.

For Retired Employees and Dependents:

(a) Employees in retired status and their dependent spouse who are enrolled in government Medicare Plans A and B shall be provided Blue Cross and Blue Shield Medicare Extended coverage. The Blue Cross-Blue Shield Prescription Drug Program ($2.00 deductible

per prescription) as described in Bulletin S462a is included provided, however, that such coverage shall be offset by the amount of any similar benefit for which such person may become eligible as a result of any future hospital-surgical legislation.

(b) In addition to the present riders now in effect for a retiree and/or his dependents not eligible for government Medicare Plans A and B, the coverage shall be the same as for Employees and Dependents.

(c) The coverage described in subsections (a) and (b) shall continue for the covered dependents of a deceased retired employee to the end of the sixth month following the month in which death occurs.

(Agreement, pp. 16-19).

The defendant claims that the Agreement in this case, in particular the dependent benefit clause, is unambiguous on its face and, therefore, provides no lifetime benefits to the plaintiffs, i.e., Pabst retirees. Moreover, argues the defendant, even if the dependent benefit clause, in the context of the total agreement, is ambiguous, the extrinsic evidence surrounding the adoption of the dependent benefit clause (that being objective evidence and the testimony of the plaintiffs' witnesses), demonstrates that there is no ambiguity in the dependent benefit clause which warrants a trial as to its meaning. In other words, the defendant argues that the Agreement itself is unambiguous in not providing lifetime benefits.

And even if it is ambiguous on its face, the plaintiffs cannot succeed on their claim that the Agreement grants lifetime benefits to them because neither the objective evidence nor their own witnesses raise a genuine issue of material fact on the question of whether it provides lifetime benefits.

In contrast, the plaintiffs argue that the Agreement does not unambiguously limit retiree benefits "for the term of the agreement" and, therefore, the parties' intent as to the meaning of the dependent benefit clause must be determined at trial. In that latter regard, the plaintiffs argue that the extrinsic evidence, including documents and witness testimony, establishes that the parties intended the retiree health benefits to be for life, or at least raises a material question of fact with respect thereto, thereby requiring a trial.

PABST'S MOTION FOR CLASS CERTIFICATION

Pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, Pabst has filed a motion requesting that the court enter an order determining that this action may be maintained as a class action for the benefit of the class consisting of all current Pabst retirees, their spouses and dependents, who were eligible for retiree life and health benefits pursuant to Pabst's collective bargaining agreements with Machinists District 10. The plaintiffs concur in Pabst's motion for class certification and agree that the named plaintiffs are proper class representatives. Because the parties agree that this action should proceed as a class action and that the named class should be certified as the plaintiff class, and because the court likewise agrees that

the prerequisites of Rule 23, Fed. R. Civ. Proc., have been met, the defendant's motion will be granted.

Rule 23(a), Fed. R. Civ. Proc., lists four prerequisites to the certification of a class and the maintenance of a class action. Those prerequisites are: (1) that the class is so numerous that the joinder of all class members is impracticable; (2) that there are questions of law or fact common to the class; (3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and, (4) that the representative parties will fairly and adequately protect the interests of the class.

Here the four prerequisites have been met. First, with approximately 45 members in the class, the class is so numerous that it is impracticable to join all class members. Second, there are commons [sic] questions of law and fact affecting rights of each member of the class, as against Pabst. Third, the claims of the named plaintiffs are typical of the claims of the class of retirees. And, finally, the four named plaintiffs will fairly and adequately represent and protect the interests of all members of the class, and have secured the representation of an attorney knowledgeable in the prosecution of the type of claims asserted in the Amended Complaint.

In their response to the defendant's motion for class certification, however, the plaintiffs also request that the court recognize District 10 as a representative of the class. Pabst has not opposed this request.

As the plaintiffs have set forth in their response, the Seventh Circuit has held that a union may sue on behalf of its members for the purpose of seeking injunctive or declaratory relief. *See Local 194 v. Standard Brands,* 540

F.2d 864, 865 (7th Cir. 1976). In *Local 194*, the court held that, in light of *Warth v. Seldin*, 442 U.S. 490 (1975), a union has standing "to represent its members who have allegedly suffered from discriminatory employment practices in so far as injunctive and declaratory relief is claimed. The union does not, however, have standing to seek, on behalf of the class, back pay or other individualized forms of monetary relief." *Local 194*, 540 F.2d at 865. Part of the relief which the plaintiffs seek in their amended complaint is declaratory and injunctive. Thus, in light of the Seventh Circuit's decision in *Local 194* (and because the defendant has not opposed the plaintiffs' request), I will also recognize District 10 as a proper plaintiff with standing to sue on behalf of its members, at least in so far as the plaintiffs are seeking declaratory and injunctive relief.

In conclusion, this action is hereby certified as a class action with the class being defined as all current Pabst retirees, their spouses and dependents, who were eligible for retiree life and health benefits pursuant to Pabst's collective bargaining agreements with Machinists District 10.

THE PRELIMINARY INJUNCTION

Before I address the merits of the parties' respective arguments, I believe it is appropriate to comment briefly upon the court's previously entered preliminary injunction or, to be more specific, what precisely was resolved in the court's preliminary injunction order and the context in which it was resolved.

Count III of the plaintiffs' amended complaint set forth a claim seeking an order compelling arbitration on

the question of whether the Agreement provided lifetime benefits for retirees. Much (although not all) of the materials and arguments presented during the course of the preliminary injunction hearing centered on the question of whether Pabst retirees were considered "employees" under the Agreement. If they were not, then they could not proceed to arbitration on their claim of entitlement to lifetime benefits.

Article XI of the Agreement defines how "grievances or misunderstandings between the Company and its employees," and the arbitration thereof, were to be handled. And, obviously, if those individuals referred to as "retirees" in the Agreement were not also considered "employees" under the Agreement, then they could not arbitrate their dispute over the matter of lifetime benefits. And if they could not arbitrate that question, then any injunction in aid of arbitration would have been rendered unnecessary. Of course, this would not have rendered entirely moot the question of a preliminary injunction. It is just that the standard of proof required for the entry of a preliminary injunction in that latter circumstance would have been different than the standard of proof required for the entry of an injunction in aid of arbitration. This then gets me to the point.

At the conclusion of the preliminary injunction hearing, I concluded, for reasons set forth on the record at that time, that the plaintiffs' claim that the Agreement afforded them lifetime health and life benefits was arbitrable. I emphasized that I was not ruling that the Agreement so provided lifetime benefits. I only ruled that the question was one for an arbitrator to decide because I was persuaded that "retirees" under the terms of the

Agreement were also to be considered "employees" under the Agreement.

Having determined that the underlying dispute was arbitrable, I then turned to consideration of the plaintiffs' motion for preliminary injunction in aid of arbitration. The standard to be applied under such circumstances was set forth in Local Lodge No. 1266, *International Assoc. of Machinists and Aerospace Workers, AFL-CIO v. Panoramic Corporation*, 668 F.2d 276 (7th Cir. 1981). In *Panoramic*, the court held that "a plaintiff . . . seeking to maintain the status quo pending arbitration . . . need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor." *Panoramic*, 668 F.2d at 285. If the plaintiffs were able to meet that requirement, they next had to demonstrate the existence of actual or threatened irreparable injury. "An injunction in aid of arbitration is appropriate . . . only when the actual or threatened harm to the aggrieved party amounts to a frustration or vitiation of arbitration," i.e., so irreparable that a decision in his favor would be but an empty victory. *Panoramic*, 668 F.2d at 286. Finally, in considering the plaintiffs' motion for preliminary injunction in aid of arbitration, I was to balance the respective hardships that each party would suffer should I rule against them. In other words, before I could enter a status quo injunction, I would have had to find that the plaintiffs would suffer more from the denial of the injunction than would Pabst from its issuance. *Panoramic*, 668 F.2d at 288.

It was in the context of the aforestated first element, i.e., that the position the plaintiffs would espouse in

arbitration was sufficiently sound to prevent the arbitration from being a futile endeavor, that I, again for reasons stated more particularly on the record at that time, found ambiguities, or vagueries, in the Agreement. At no time did I find that the plaintiffs had a likelihood of success on their claim. Rather, I found that there were sufficient ambiguities in Article VII of the Agreement with respect to the issue of vesting of benefits that the plaintiffs' position was sufficiently sound to prevent the arbitration from being a futile endeavor. In other words, I found that there was a genuine dispute with respect to an arbitrable issue.

However, that I made such finding in the context of a request for a status quo injunction in aid of arbitration does not necessarily mean that I found, for all purposes, that the language of the Agreement is ambiguous. I did not. All this is to say that, in my view, at this stage, i.e., the summary judgment stage, the slate is clean on the issues presented by this lawsuit. This includes the question of whether the language of the Agreement in this case, on its face, is or is not ambiguous. It is with this mind set that the court will address the merits of the defendant's motion for summary judgment.

SUMMARY JUDGMENT STANDARDS

A district court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P.

The purpose of summary judgment is to "pierce the pleading and to assess the proof in order to see whether there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The standard governing summary judgment is clear: '[I]f no rational jury could, on the evidence presented in the summary judgment proceeding, bring in a verdict for the party opposing summary judgment . . . then summary judgment must be granted.' " *Oates v. Discovery Zone*, 116 F.3d 1161, 1175 (7th Cir. 1997) (quoting *Visser v. Packer Engineering Associates*, 924 F.2d 655, 660 (7th Cir. 1991)).

"A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A party opposing a properly supported summary judgment motion "may not rest upon mere allegations or denials" but rather must introduce affidavits or other evidence to "set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), Fed. R. Civ. P.; *see also Reid v. Norfolk & Western Ry. Co.*, 157 F.3d 1106, 1110 (7th Cir. 1998). "To state it differently, a party will be successful in opposing a summary judgment motion only when they present definite, competent evidence to rebut the motion." *Smith on Behalf of Smith v. Severn*, 129 F.3d 419, 426 (7th Cir. 1997).

To determine if a genuine issue of material fact exists, the court must review the record, construing all facts in a light most favorable to the nonmoving party and drawing

all reasonable inferences in that party's favor. *See DiGiore v. Ryan*, 172 F.3d 454, 460 (7th Cir. 1999). " 'In the light most favorable' simply means that summary judgment is not appropriate if the court must make 'a choice of inferences.' " *Draghi v. County of Cook*, 184 F.3d 689, 691 (7th Cir. 1999). However, neither "the mere existence of some alleged factual dispute between the parties," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986), nor the existence of "some metaphysical doubt as to the material facts," *Matsushita Elec.*, 475 U.S. at 586, is sufficient to defeat such a motion. *See Jackson v. E.J. Branch Corp.*, 176 F.3d 971, 981-82 (7th Cir. 1999).

Thus, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

THE MERITS OF THE MOTION FOR SUMMARY JUDGMENT

The first, and ultimately the dispositive, question that the court has to resolve in this case is whether the language which is found in Article VII of the most recent collective bargaining agreement (i.e., that which covered the period from June 1, 1993 to June 1, 1995), and which language speaks to the rights of retirees to health and welfare benefits, is ambiguous with respect to whether such benefits are lifetime benefits. As stated previously, in the view of the defendant, the Agreement in this case

is unambiguous on its face in not providing lifetime benefits. Moreover, according to the defendant, even if one were to consider the extrinsic evidence produced by the plaintiffs in support of their position, such evidence fails to show either that a "contract that appears to be clear is actually ambiguous" or that the parties intended a lifetime benefit.

In contrast, the plaintiffs argue that the Agreement is ambiguous. Therefore, they argue that it is necessary to examine extrinsic evidence in order to determine the intent of the parties with respect to the granting of lifetime benefits; that such an examination reveals a genuine dispute on such issue; and, therefore, that summary judgment is not appropriate. Rather, a trial is necessary on the issue of the parties' intent.

Both parties seem to acknowledge that the starting point for analysis in this case is the Seventh Circuit's en banc decision in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993). In *Pabst Brewing Company, Inc. v. Corrao*, 161 F.3d 434, 439 (7th Cir. 1998), the court of appeals stated, in discussing *Bidlack*, that "*Bidlack* involved an assertion of a right to lifetime health benefits on behalf of retired employees of a company. As the court pointed out there, whether or not the retirees were entitled to such benefits depended entirely on the contract between the company and the employees, and there, as here, that contract was a collective bargaining agreement. *Id.* at 604-05. ERISA does not require the vesting of welfare benefits; if they vest at all, they do so under the terms of a particular contract." *Corrao*, 161 F.3d at 439.

In *Corrao* the court went on to state that:

[t]he first question considered in *Bidlack* was whether the absence of express language in the CBA indicating that the retirees had a vested right in lifetime health benefits was fatal to their claim. Qualifying the earlier decision in *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), both opinions in support of the result concluded that it was not. The lead opinion also recognized that it is possible for a contract to create obligations that survive the termination of the agreement, such as a post-employment restrictive covenant or a commitment to arbitrate disputes. Nevertheless, because of the gravity of assuming that a fixed term contract (as CBAs invariably are) has created a perpetual obligation, the lead opinion argued for a presumption that a CBA ceases to obligate the employer when its term is up. . . . Rejecting the twin extremes of requiring an explicit formula of words to defeat the presumption and of permitting unlimited testimony about the parties' subjective intentions, the lead opinion adopted the middle ground, whereby the language of the agreement would govern unless the parties could show that extrinsic evidence was necessary (1) to show that a written contract that appears to be clear is actually ambiguous, (2) a term or terms in the contract are ambiguous, or (3) that there is "some yawning void . . . that cries out for an implied term.". . . . If the agreement is plausibly complete on its face, then extrinsic evidence cannot be used to add terms to it. *Id.*

Applying these rules to the agreements before it, a majority of the judges in *Bidlack*

agreed that they were vague and inconclusive on the question whether some kind of right to lifetime health benefits had vested in the retirees. . . . Some terms, such as one similar to the spousal benefit clause here, said once retirees reached the age of 65 the company would pay the full cost for their health insurance, and that after their death, their spouses would receive supplemental health benefits, again at the company's expense. Because nothing in the agreement qualified that clause or tried to tie it to the duration of the CBA, the majority favoring reversal thought that it offered some evidence that the benefits were to last for life. *Id.* Without extrinsic evidence to clarify the CBA, it was impossible to say whether the company had promised lifetime health benefits or not. . . .

Post-*Bidlack* decisions in cases involving retiree entitlements to health or welfare benefits have reflected the critical importance of the language of the agreement. In *Murphy v. Keystone Steel & Wire Company* [61 F.3d 560 (7th Cir. 1995)], the court upheld a grant of summary judgment for the company on the ground that the contract was unambiguous and that it clearly indicated that the retirees' benefits did not vest. Unlike the CBA in *Bidlack*, the one in *Murphy* addressed the duration of the benefits and provided that they would "remain in effect during the term of this agreement. . . . " 61 F.3d at 565. The Plan itself said that retiree coverage would terminate "upon the date of the Plan is terminated or amended to terminate the Retiree's coverage." *Id.* at 565-66. The court found that extrinsic evidence could not be used to contradict the meaning of these terms, but it

> also commented that the plaintiff's objective extrinsic evidence was consistent with its reading all the CBA in any event. *Id.* at 567. On the other hand, in *Diehl v. Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996), the court reviewed a retiree benefit claim brought under an agreement that explicitly said that "[a]ll persons retired prior to the date of termination of the [Retirement] Plan . . . shall, notwithstanding [the Insurance Agreement], be entitled for the lifetime of the pensioner (including the surviving spouse until death or remarriage), to the life insurance and hospitalization, medical and surgical expense benefit coverages . . . " *Id.* at 302-03. Even though there were other parts of the agreement that might have supported a finding in the company's favor, the court found this to be enough to show that the contract gave the retirees certain vested rights in a lifetime benefit. It remanded for further proceedings to explore the question whether certain modifications to the plan effectively cut off of retirees' rights.

Corrao, 161 F.3d at 440-41.

In *Corrao*, the Seventh Circuit affirmed the decision of the lower court, which had found in favor of defendant Pabst (the same Pabst Brewing Company that is the defendant in the case at bar). In doing so, the Seventh Circuit found that the CBA in question did not provide lifetime health benefits because the CBA included a clause which "contained the central promise by Pabst, the employer, to provide 'major medical, health, dental, sickness and accident, and life insurance benefits' to its employees – active and retired alike [and that] promise extended 'for the term of this Agreement.' "

In *Corrao*, the court acknowledged that the spousal benefit clause in the CBA in question did not have in it the phrase "whichever occurs first". And it was the absence of such a phrase that the Seventh Circuit found to have created an ambiguity in *Bidlack*. ("For the provision [i.e. the CBA spousal benefit clause] does not say 'when they die or the collective bargaining agreement expires, whichever occurs first', but simply when they die." *Bidlack*, 993 F.2d at 608.) But, the CBA in *Corrao* did contain language, which language was found in Article VII thereof, that the court determined unambiguously limited the benefits in question to the term of the agreement, rather than possibly for life. That precise language was:

> For the term of this Agreement, the Employer, at its sole cost and expense, shall provide major medical, health, dental, sickness and accident, and life insurance benefits in accordance with an[d] as summarized in Appendix A attached. It is understood that the benefits set forth may be provided by specifically referred to plans or equivalent benefits will be provided under different plans including self insurance by the Employer, and further that the actual insurance policies, documents or plans shall control over the summary set forth in Appendix A in the event of conflicting provisions. (emphasis provided)

The Agreement in the case at bar does not contain language precisely matching that found by the court in *Corrao* to have not created an ambiguity regarding the

question of lifetime benefits. Article XVI of the Agreement, however, which article was executed by the parties on September 1, 1993, does state:

> This Agreement, signed this 1st day of Sept[ember], 1993, shall become effective July 1, 1993, and shall remain in effect until the 1st day of July, 1995, thereafter automatically renewing itself from year to year until either party hereto gives to the other a sixty (60) day written notice prior to July 1, 1995, or before the end of any subsequent year of a desire to change this Agreement.
>
> The invalidity of any clause in this Agreement shall not affect the validity of the remainder of this Agreement.
>
> All provisions of this Agreement are subject to applicable federal and state law and regulations.

Quite obviously, the above quoted language does not include the phrase "for the term of this agreement", and it was the presence of that phrase in the *Corrao* CBA that led both the district court and the court of appeals to find that particular CBA to have unambiguously not provided lifetime benefits. Such being the case, I am unable to find that *Corrao* is "on all fours" with the case at bar. In other words, Article XVI does not unambiguously indicate that the health and welfare benefits are not lifetime benefits.

But, I am likewise unpersuaded that the above language found in Article XVI of the Agreement unambiguously indicates that the health and welfare benefits are lifetime benefits. Thus, in order to ascertain whether the Agreement on its face unambiguously does or does

not provide lifetime benefits, it is necessary to examine Article VII and, in particular, the language thereof relating to benefits for retirees and their dependents. In doing so, the court will bear in mind, as it must, that in *Bidlack* the court of appeals held there to be a presumption "that a collective bargaining agreement ceases to obligate the employer when the agreement's term (invariably three years) is up [although] it is not an irrebuttable presumption." *Bidlack*, 993 F.2d at 607. I must also keep in mind that if the collective bargaining agreement is merely completely silent on the duration of benefits for retired employees, and if nothing in the structure of the agreement requires the duration to be perpetual, then extrinsic evidence will not be allowed to show that the retirees have a perpetual entitlement. *Id.* at 608.

The court will also bear in mind that the operative provision in *Bidlack*, which the Seventh Circuit found, on its face, to be ambiguous, was substantially different from the operative provision found in the case at bar. In *Bidlack*, that provision was as follows:

> "[T]hose employees who have retired since September 22, 1959, will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company after they attain sixty-five (65) years of age" and . . . they would be entitled to certain supplemental health benefits, also paid for by the Company, "which, combined with Medicare, will provide a level of benefits equal to the Wheelabrator Blue Cross-Blue Shield plan for active and retired employees sixty-five (65) years of age or over" and which "shall be

> continued for the spouse after the death of the retiree."

Bidlack, 993 F.2d at 605.

Those subsections of Article VII of the Agreement which are, at least as a first step in the analysis, relevant in this case are found at page 19 of the Agreement. They state, with respect to "Retired Employees and Dependents", that "(a) Employees in retired status and their dependent spouse who are enrolled in government Medicare Plans A and B shall be provided Blue Cross and Blue Shield Medicare Extended coverage . . . (b) [i]n addition to the present riders now in effect for a retiree and/or his dependents not eligible for government Medicare Plans A and B, the coverage shall be the same as for Employees and Dependents [and] (c) [t]he coverage described in subsections (a) and (b) shall continue for the covered dependents of a deceased retired employee to the end of the sixth month following the month in which death occurs." (emphasis provided)

The operative language in the above quoted portions of the Agreement consists of the phrases "shall be provided" and "shall continue". Obviously, such phrases denote the extending of benefits to retired employees and their dependents for at least some period of time into the future. And obviously the triggering date for the six month extension of benefits for a dependent of a deceased retired employee is the date of death of the retired employee. But can the language found at subsection (a) be reasonably construed to mean that the benefits referred to in that subsection have been granted to retired employees and their dependent spouse for life? And can

the language found at subsection (c) be reasonably construed to mean that the benefits referred to in subsections (a) and (b) will, at the death of the retired employee, assuming he dies, for example in the year 2010, have already been extended from 1995 through 2010 by the terms of the Agreement?

Interestingly, remarkably similar language to that found in subsection (c), above, is found in subsection (c) of that section of Article VII dealing with "Employees and Dependents". That section, found at pages 18-19 of the Agreement, sets forth the medical and dental plans that will be provided to those currently working at Pabst. And subsection (c) states that "[t]he coverage described in Subsection (a), (b), and (c) (sic) shall continue for the covered dependents of a deceased active employee to the end of the sixth month following the month in which death occurred." Moreover, Section 1 of Article VII states that "[t]he Company, at its sole cost and expense, shall provide and furnish medical, health, dental, sickness and accident, and life insurance coverage for employees actively at work in the bargaining unit and their dependents (including dependent children from age twenty-five (25) for life if totally and permanently disabled), and also to retired employees and their dependents, subject to the conditions specified herein." (emphasis provided)

In other words, the Agreement states that the Company "shall provide" both to active employees and to retired employees certain defined health and welfare benefits. The Agreement also grants both to the dependents of a deceased retired employee and to the dependents of a deceased active employee continuation of "coverage" to the end of the sixth month following the death of the

retired or active employee. (The court notes that in the two subsection (c)'s there is a difference in tense of the word "occur"; in the Retired Employee subsection (c) it is the past tense, and in the Active Employee subsection (c) it is the present tense. However, I do not find such difference to make a material difference in my analysis).

That the Agreement contains language virtually identical in character when referring to (1) the providing of benefits, in the first instance, to active employees and to retired employees and their dependents, and (2) the continuation of health and welfare benefits to the dependents of deceased active employees and to the dependents of deceased retired employees is, in my opinion, extremely telling. For, the plaintiffs do not argue that the Agreement granted lifetime health and welfare benefits to those who were active employees at the time of its execution. Indeed, they would be hard-pressed to reasonably do so in light of the court of appeals' decision in *Bidlack*. And if the express language of the Agreement fails to grant lifetime health and welfare benefits to those who were active employees at the time of its execution, does it not follow that that same express language fails to grant lifetime health and welfare benefits to those who were retired employee [sic] at the time of the Agreement's execution? I believe that it does.

This conclusion is fortified by the afore-quoted language from Section 1 of Article VII. That section expressly and unambiguously provides that there is, indeed, a category of individuals for whom lifetime health and welfare benefits will be provided by Pabst – dependent children of active employees in the bargaining unit if they (that is, the dependent children) are totally

and permanently disabled, such benefits being provided from age twenty-five (25) for life. Thus, if the parties truly intended to extend lifetime health and welfare benefits to retired employees and their dependents, the language of Section 1 of Article VII shows that they knew how to draft language which would effectuate such intention.

More importantly, however, the absence of such language leads me to conclude that the Agreement is not merely ambiguous or vague regarding the duration of health and welfare benefits for retired employees; instead, it is "completely silent on the duration of health benefits for retired employees". *Bidlack*, 993 F.2d at 608. And because there is nothing in the structure of the Agreement that requires the duration be perpetual or some "yawning void [in the Agreement] . . . that cries out for an implied term", I am compelled to find, in accordance with the *Bidlack* decision, that "the presumption that all contractual obligations cease on the expiration date stated in the contract" is extant in this case. *See id.* Stated another way, I am persuaded that the Agreement is not ambiguous regarding the question of whether, under its express terms, retired employees are provided lifetime benefits. Under its terms, they are not.

Indeed, the language found in the Agreement is similar to that found in a CBA addressed by the court in the recent case of *International Union, United Auto., Aero. & Agri. Implement Workers v. Skinner Engine Co.*, 188 F.3d 130 (3rd Cir. 1999). And in *Skinner* the court found such language to unambiguously not provide lifetime benefits to retired employees. In arriving at this conclusion the court first noted that the phrases, "will continue" and

"shall remain," in the CBAs did not unambiguously indicate that the benefits would continue ad infinitum, as argued by the retirees. *Id.*, at 141-42. Nor, when read in their in their [sic] appropriate contexts within the CBA, could those phrases be interpreted to mean that Skinner would pay for such benefits for the life of a retiree. *Id.* at 142-43. The court stated:

> Accordingly, when read in proper context, there appears no textual support for the appellants' contention that the use of the phrases, "shall remain" and "will continue," manifested an intent on the part of contracting parties to vest life and medical insurance benefits for retirees. Rather than indicating a promise on the part of the company to provide such coverage prospectively for the life of the retiree, the phrases were used to indicate a continuation of prior practice and policies. Appellants' contentions here have legitimacy only if this court were to view the phrases in a vacuum, without considering the appropriate contexts in which they were used. . . .
>
> The above conclusion is supported by the fact that the company's representation that it "will continue" to provide medical insurance benefits appears to have applied to both active employees and retirees. Clearly, the medical insurance benefits did not vest for active employees, and there has been no argument to the contrary. Yet, the CBA provisions make no material distinction between active employees and retirees in this regard. The only reasonable conclusion – if one begins with the uncontroversial premise that benefits for active employees

> were not vested – is that benefits for retirees were likewise not vested.

Skinner, at 143-44.

As stated previously, the parties have submitted to the court extrinsic evidence in support of their respective positions. It is well settled, however, that extrinsic evidence may not be used to create an ambiguity where none exists. As the Seventh Circuit stated in *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995),

> [A]lthough extrinsic evidence can be used to show that a contract is ambiguous . . . extrinsic evidence cannot be used to create an ambiguity. . . . There is no contradiction here. The party claiming that a contract is ambiguous must first convince the judge that this is the case . . . and must produce objective facts, not subjective and self-serving testimony, to show that a contract which looks clear on its face is actually ambiguous. . . . Just as the court must determine whether a contract is ambiguous, so too the court must determine whether the extrinsic evidence offered in a given case interprets or contradicts the contract.

Murphy, 61 F.3d at 565.

In support of their position that the Agreement is ambiguous on the question of duration of benefits for retirees, the plaintiffs have presented select documents and the deposition testimony of various individuals in a effort to show, inter alia, how the bargaining history behind the Agreement demonstrates "that when Pabst and The Machinists negotiated the dependent benefit clause, they understood that retirees' health insurance

already extended until the retirees' death; the dependent benefit built upon the already existing lifetime benefit for retirees." (Plaintiffs' Brief in Opposition to Summary Judgment, p. 5). That is to say, the plaintiffs' extrinsic evidence is offered to show that the words of the Agreement do not mean what they say. They mean something else (or, more precisely, they were intended to mean something more than what they say) and, therefore, the Agreement is, or at least portions of it are, ambiguous. In my view, however, what the plaintiffs are attempting to do is precisely what the Seventh Circuit said could not be done by use of extrinsic evidence. They are attempting to create an ambiguity where none exists within the four corners of the document. Although their effort is an understandable and noble effort to save their case, it is, in the end and for the reasons stated, an effort that must fail. Accordingly, I have disregarded such extrinsic evidence in reaching my decision in this case.

CONCLUSION

And so we have reached that stage where the court must issue its ruling. It is not a ruling which I issue cavalierly. Nor is it a ruling which I take particular pleasure in issuing. Sadly, however, it is a ruling which I am persuaded that the law and the terms of the Agreement compel. Lifetime benefits may be what the plaintiffs in this action expected the Agreement would provide them. But, lifetime benefits is not what the Agreement did, in fact, provide them. Such being the case, the defendant's motion for summary judgment must be granted.

NOW THEREFORE IT IS ORDERED that the defendant's motion for summary judgment be and hereby is **GRANTED;**

IT IS FURTHER ORDERED that judgment be entered in favor of the defendant and against the plaintiffs on the plaintiffs' claims for violations of ERISA and § 301 of the LMRA;

IT IS FURTHER ORDERED that judgment be entered in favor of the defendant and against the plaintiffs on the defendant's claim for declaratory relief that the Pabst Brewing Company, Inc.'s termination of eligibility and elimination of benefits to the retirees under the Agreement is not violative of ERISA, is not a breach of its collectively bargained obligations in violation of § 301 of the LMRA, and is otherwise lawful in all respects;

IT IS FURTHER ORDERED that the plaintiffs' motion for class certification be and hereby is **GRANTED;**

IT IS FURTHER ORDERED that this action be and hereby is **DISMISSED.**

SO ORDERED this 1st day of November, 1999, at Milwaukee, Wisconsin.

/s/ Willaim E. Callahan, Jr.
WILLIAM E. CALLAHAN, JR.
United States Magistrate Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 31, 2000

Before

Hon. Richard A. Posner, *Chief Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

No. 99-4076

FRANK M. ROSSETTO, JERRY SKIDMORE, JOHN S. BOROWSKY, et al.,

Plaintiffs-Appellants,

v.

PABST BREWING COMPANY, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 96 C 1086

William E. Callahan, *Magistrate Judge.*

ORDER

On July 13, 2000 defendant-appellee filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED.**